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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959.

No. 732

LOCAL UNIONS NOS. 189, 262, 320, 546, 547, 571 AND 638, AMALGAMATED MEAT CUTTERS AND BUTCHER WORKMEN OF NORTH AMERICA, AFL-CIO, ET AL.,

Petitioners,

vs.

JEWEL TEA COMPANY, INC.,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW.

Correctly stated in the petition.

JURISDICTION.

Correctly stated in the petition.

QUESTION PRESENTED.

The question posed by the petition assumes the essence of the very contention petitioners seek to raise, namely that the National Labor Relations Board has authority to regulate the number of hours during which meat vending merchants may do business with the public. That assump-

tion is fantastically erroneous. We think no question of "primary jurisdiction", in the Labor Board is properly involved and are supported in that thought by the fact that although this case has been pending since July 29, 1958, the first time the phrase "primary jurisdiction" has been used is in the instant petition—an obvious last minute reaching for a phrase or concept that might induce the Court to grant certiorari and thus delay a trial.

We believe the actual question is:

> May a union combine with a trade association representing a substantial segment of the retail meat market operators in a large metropolitan area to control and limit the hours during which competitive market operators may offer meat for sale to the public?

Or, cast in the frame petitioners seek to use:

> Does the Labor Board have jurisdiction to exempt from the ban of antitrust laws a business-union conspiracy to limit the hours of competition in sales of meat to the public?

Specifically, the question centers on the following contract clause:

> "Market operating hours shall be 9:00 a.m. to 6:00 p.m. Monday through Saturday, inclusive. No customer shall be served who comes into the market before or after the hours set forth above. In those stores in which the grocery departments remain open after 6:00 p.m. only the following products may be sold after 6:00 p.m. [then follows a list of so-called 'delicatessen meats']" (R. 23, 38).

STATEMENT.

This case, at the election of petitioners, is presented on motion to dismiss the complaint. Although the petition seeks (p. 14) to explain or deny averments of the complaint, the facts remain (a) the complaint now stands as admitted, and (b) no final judgment has been entered. Petitioners will have opportunity on the trial to contradict, if they can, the complaint.

The complaint (R. 1 *et seq.* Par. references hereinafter are to the numbered paragraphs of the complaint) shows:

Plaintiff-respondent, Jewel Tea Company, Inc. (Jewel), operates some 196 retail food stores in the Chicago area. Its annual sales of meat exceed $5,000,000; total sales of foods, meats, toiletries, utensils, and other goods commonly sold in modern supermarkets approximated $285,000,000 in 1957.

Defendant Associated Food Retailers of Greater Chicago, Inc. (Associated) is a corporate trade association representing several thousand retail food stores which compete with Jewel. Associated's charter requires it "to seek, in every legitimate way, the advancement of its members, and with due regard of the public welfare, in every way to defend and preserve the principle of individual [apparently as distinguished from chain] merchandising." Its Secretary and Treasurer (Bromann) is also named a defendant.

The various other defendants, petitioners here (collectively referred to as "Amalgamated"), are local unions of Amalgamated Meat Cutters and Butcher Workmen of North America—AFL-CIO and their officers.

THE FUNDAMENTAL MISSTATEMENT AND NON-EXISTENT PREMISE OF THE PETITION.

The petition fails to inform the Court that the restriction on respondent's *market sales hours*, the subject of the suit, is treated in the labor contracts involved as a subject *entirely separate* from *hours of work by individual butchers*. The restriction prohibiting *sales* by respondent after 6:00 p.m. is a flat prohibition against dealing with the public and is set forth in self-contained "ARTICLE 5. MARKET OPERATING HOURS" (R. 23, 38).

Although the conspirators insist that respondent sell no meat after 6:00 p.m., *they are willing that butchers work after that hour. By wholly separate articles of the contracts*, "ARTICLE 4. WORKING HOURS AND OTHER CONDITIONS OF EMPLOYMENT" (R. 22, 37), they agree:

> "Overtime at overtime rates *may be worked behind locked doors from 8:00 a.m. to 9:00 a.m., after 6:00 p.m.*, and after eight (8) hours in any one day, *at the Employer's discretion.*"

The contracts thus mean that butchers are willing to, and do, work after 6:00 p.m. preparing and dressing meats until such hour as the employer believes proper, provided they are paid overtime. The contracts do not treat market operating hours either as "working hours" or as a "condition of employment."

From the foregoing it will be seen that such statements as the second sentence following, taken from page 10 of the petition, and around which the entire argument of the petition is constructed, are unpardonably contrary to fact:

> "(a) The complaint attacks as an antitrust violation the contractual requirement that retail marketing hours shall cease at 6:00 p.m. *The exact counterpart of this limitation is the contractual requirement that the workday shall cease at 6:00 p.m.*"

Articles 4 and 5 of the contracts are not counterparts and a butcher's workday need not cease at 6:00 p.m. Article 4 is a device to control the marketing of meat and to prevent Jewel from offering convenient hours of shopping as an element of competition. Articles 4 and 5, read together, impose a complete ban on sales to the public after 6:00 p.m. but impose no such ban on work by butchers; they give the market operator complete discretion as to the hours during which butchers will actually work.

The real purpose of the conspiracy is confessed in the following illuminating language at the foot of page 12 of the petition:

> "* * * to prevent loss of work by one type of market [service] to the other [self-service] based on differences in marketing hours, it is necessary that the marketing hours be kept the same in both types of stores."

THE "PRE-PACKAGED, SELF-SERVICE" SYSTEM OF VENDING MEAT AND LOWER PRICES

Modern methods of refrigeration and wrapping of meats permit an operator to have cuts of meat prepared in advance of sale. Such cuts are wrapped in sanitary transparent wrapping, marked as to weight and price, and are displayed in special refrigerated cases from which customers may remove the package, take it to the store cashier and purchase it. This system permits efficient utilization of the butchers' time by enabling them to prepare a supply of cuts free from interruptions arising from necessities of serving individual customers; the system offers operating economies that enable the market operator to sell at lower prices than are required in the so-called "service system" where the butcher waits for each individual customer to place an order and then prepares the desired cut (Par. 10). Under the "pre-packaged, self-service system" the butcher

need not be on duty in the store at the time the customer selects his desired cut and actually makes the purchase (Par. 11).

THE DEMAND FOR EVENING MARKET HOURS

Approximately 90% of Jewel's customers desire to be able to purchase fresh meats one or more evenings per week (Par. 12). In thousands of Chicago area households both husband and wife are employed, save for Saturdays, during the only hours (9:00 a.m. to 6:00 p.m.) during which defendants will permit Jewel to sell meat (Par. 12). Even in households where the wife is not employed, the hours dictated by Associated and its co-conspirators are often extremely inconvenient because the husband is using the family car so that it is not available for shopping (Par. 12).

Similar shopping and transportation conditions prevail in many of the metropolitan areas of the country and in most of them have led to the evening sale of meats through the "pre-packaged, self-service" system. In many such areas the butchers involved are members of other local unions of Amalgamated (Par. 13). As may be inferred from the provisions of the self-service contract, supermarket grocery departments have evening hours in the Chicago area but meat departments of the same stores are closed (R. 38).

Jewel has approximately 174 stores presently equipped for the "pre-packaged, self-service" system of vending meats. It would vend meats in all or most of them one or more evenings a week but for the conspiracy of the defendants (Par. 14).

THE CONSPIRACY.

For many years Associated, its co-conspirator members, and defendant Bromann, have conspired with one another and Amalgamated to prevent their competitors from selling fresh meat except between the hours of 9:00 a. m. to 6:00 p. m. Mondays through Saturdays (Par. 15). Associated has insisted that the unions act as the enforcing agent of the conspiracy by forcing *all* employers in this area to sign agreements that they will not sell fresh meat except during such hours (Pars. 16, 19). Defendant unions have entered into this conspiracy and advanced it by threatening to strike any employer who would not enter into, or who violated, these competition suppressing provisions (Pars. 19, 21, 22). The strike threat is a potent one because Amalgamated has a monopoly on the persons trained and fitted to cut meat in the Chicago area (Par. 4a).

Acting under the compulsion of the conspiracy, Jewel was forced to sign the restrictive agreements. From the outset of negotiations plaintiff protested that the restriction on its hours of operation was an illegal restraint of trade, but Associated refused to enter into any agreement permitting night openings and petitioner unions supported and abetted it in that refusal (Par. 20).

Amalgamated threatened to strike and picket plaintiff's stores. Plaintiff could not have operated its meat departments without the services of the numerous members of Amalgamated which it employs and such a strike would have inflicted great and severe damage upon it and have caused great public inconvenience because plaintiff not only would have been unable to sell meat but would have been unable to obtain delivery through the picket line of many perishable products such as bread, milk, etc. (Par. 21).

RESULT OF THE CONSPIRACY.

As found by the Court of Appeals, "the operation of this agreement has enabled Associated stores to remain closed after 6 P. M. without fear of losing trade to plaintiff, a major competitor, because of evening sales and also to avoid the added expense of remaining open during the evening" (Pet. p. 8a).

REASONS FOR DENIAL OF THE WRIT.

I.

The complaint shows a classic instance of a combination of labor unions with a non-labor group to control the marketing of goods, precisely the thing condemned in *Allen-Bradley Co. v. Local Union No. 3*, 325 U. S. 797, which held (p. 808):

> "* * * Congress never intended that unions could, consistently with the Sherman Act, aid non-labor groups to create business monopolies and to control the marketing of goods and services."

The purpose of the instant control is to eliminate entirely convenience of shopping hours as an element of competition in the marketing of meats and to permit competitors to compete for sales only during specified hours. Or, as stated somewhat differently by the Court of Appeals, the purpose of the conspiracy is to protect the merchant who is unable or unwilling to offer evening shopping hours from a competitor (Jewel) which is willing to offer them and, by meeting the public need, diverting business to itself. The burden which this restriction places on the public becomes heavier each year: spreading suburban developments make the use of the family automobile outside of usual hours of factory or office employment almost a necessity for shopping. As the complaint shows,

Chicago is virtually the last, if not the last, metropolitan area in the country in which the public cannot buy meat in the evening.

Virtually identical combinations and restrictions limiting hours of competition in the retail sale of meat have been held illegal by the United States District Court for Minnesota, by state courts of California, and by a *nisi prius* court in Wisconsin under federal antitrust law or counterpart state law.

Red Owl Stores v. *Amalgamated Meat Cutters* (U. S. D. C., Minn.), 109 F. Supp. 629, involved a conspiracy much like the one at bar except that the employers there involved combined informally rather than through a formal trade association as here. The matter arose on opposing motions for a preliminary injunction and for summary judgment. The court held that neither form of preliminary or summary relief was proper, that the complaint stated a cause of action, and that the case should be decided only upon a full trial. It ruled as a matter of law (p. 634):

> "Respectable authority requires injunctive relief where the record discloses a combination between a union and business groups to restrain competition."

The California cases are *Kold Kist* v. *Amalgamated Meat Cutters*, 99 Cal. App. 2d 191, 221 P. 2d 724, and *Alpha Beta Food Markets* v. *Amalgamated Meat Cutters*, 147 Cal. App. 2d 343, 305 P. 2d 163.

In *Kold-Kist*, a manufacturer of frozen foods sued under the California antitrust laws to enjoin the unions and certain market operators from entering into agreements which would have prevented sale of frozen meats from self-service cases after 6:00 p. m. The court pointed out that the work hours of the butchers was not the subject of dispute and sustained the issuance of a preliminary injunction.

In the *Alpha Beta* case the ban was against the sale of pre-packaged frozen meat through self-service display cases at any time. The California court entered a declaratory judgment that such a prohibition was illegal under both the federal and state antitrust acts, relying, of course, in part on this Court's *Allen-Bradley* decision.

The Wisconsin *nisi prius* decision was under the Wisconsin state antitrust law. The case is *Demske* v. *Geroy*, 42 L. R. R. M. 2667.

It is difficult to believe that all of those courts, and the District Court and the Court of Appeals in the case at bar, were wrong, and that only learned counsel for Amalgamated are right. There is no case, so far as we are advised, and the petition cites none, that has ever upheld this type of competition suppressing restriction whether imposed by a union alone or by a union in combination with competitive business groups.

In short, as to the merits of the case, the petition does not cite any authority indicating probable error in the substantive decision reached; it is an illusive tour de force having the ultimate objective of overruling *Allen-Bradley* and suggesting that the place to start that overturn is in the Labor Board. However, assuming, *arguendo*, that the controversy was properly before the Labor Board, no case or statute is cited which would have warranted that tribunal (or its General Counsel) in arriving at a conclusion different from that of the District Court and the Court of Appeals.

II.

The complexly stated reasons in support of the petition's assertion that the Labor Board has primary jurisdiction of this controversy may be reduced to the following syllogism:

> A union, through Labor Board proceedings, can compel bargaining as to hours of employment.

> The hours during which a meat market is open for sales to the public are "related", or are "relevant" to the hours of work of employees in the market (p. 10).
>
> Therefore, restriction of the hours during which a merchant employer may compete for sales with other merchants is a subject "within the regulatory scope of the National Labor Relations Act," the antitrust laws to the contrary notwithstanding (p. 15).

To state that startling syllogism simply and accurately is to show its invalidity.

It is possible to argue that nearly anything that goes on in a business enterprise *affects* or has *relevancy* to hours, conditions of work or rates of pay, and therefore is within the jurisdiction of the Labor Board. It could be said that since the quantity and quality of advertising engaged in by a business affects the volume of work available for employees, unions, in combination with competitor businessmen, have a right to require the employer to limit, change or expand an advertising program; or to change the number, duties and the compensation of officers of the company; or to seek a bank loan or to float a bond issue for capital improvements; or to change the line of products dealt in or manufactured. Such examples show the scope and the basic unsoundness of Amalgamated's position. The Labor Act requires bargaining only on "wages, hours, and other terms and conditions *of employment*" (Sec. 8(d), *semble* Sec. 9(a), Pet. p. 15a). The words "*of employment*" are words of limitation. The Act does not require bargaining on matters other than those of employment regardless of the fact that such other matters ultimately may *affect* wages or hours.

The artful use, in the petition, of the phrase "the *regulatory scope* of the National Labor Relations Act" is an

invalid dialectic device of using the word "regulate" in a totally different sense from the sense heretofore used in connection with the "primary jurisdiction doctrine" in antitrust cases. "Regulated" (or "regulatory") has heretofore been used in such cases as a descriptive word indicating enterprises, usually utilities or common carriers, which are permitted to exercise a degree of monopoly, but whose rates and services are subject to control by an administrative agency. The Labor Act is not a "regulatory" act in that sense of the word at all.

The Labor Act does not "regulate" the food distribution industry, or any industry, *per se*. However, generically all law is regulation, and in that sense the Labor Act regulates phases of the employer-employee relationship just as the Fair Labor Standards Act regulates other phases thereof. (Note that in *International Association of Machinists* v. *Gonzales*, 356 U. S. 617, 630, the Chief Justice speaks of the Labor Act as "regulation of labor relations"—wholly accurate terminology having a connotation quite different from that of the petition).

The doctrine of primary jurisdiction in an administrative agency to determine permissible deviations from antitrust principles, has heretofore been, and in logic should be, applied, or seriously considered, only in "regulated" industries, as witness typical cases the titles of which bespeak the distinction we have suggested: *Keogh* v. *Chicago & N. W. Ry.*, 260 U. S. 156; *United States Navigation Co.* v. *Cunard S. S. Co.*, 284 U. S. 474; *Georgia* v. *Pennsylvania R. R.*, 324 U. S. 439; *Federal Communication Commission* v. *RCA Communications*, 346 U. S. 86; *Federal Maritime Board* v. *Isbrandtsen Co.*, 356 U. S. 481.

Professor Davis, (from whose text, brief phrases are quoted out of context in the petition) puts it as follows:

"In an unusually penetrating article, Mr. Robert B.

> von Mehren properly states the function of the primary jurisdiction doctrine in antitrust cases: 'All that it is designed to do and all that it properly does is to assure that the substantive exemptions from the antitrust laws created by Congress or required by the logic and structure of the regulatory scheme are not destroyed through by-passing the forum chiefly concerned with the regulation of the industry in question'" (3 Davis, *Administrative Law Treatise*, 38).

The sum of the matter here is: (1) The food distribution industry is the antithesis of a regulated industry. Competition has been enforced and the antitrust laws have been applied to it rigorously (*U. S.* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F. 2d 79; *U. S.* v. *New York Great Atlantic & Pacific Tea Co.*, 137 F. 2d 459; *U. S.* v. *Safeway Stores, Inc.*, *U. S.* v. *Kroger Grocery & Baking Co.*, 144 F. 2d 824). (2) There is not a line in the National Labor Relations Act, as amended, or in the debates on the Wagner, Taft-Hartley, or Landrum-Griffin Acts indicating that Congress had the remotest intention by those Acts of relaxing antitrust prohibitions against business-union combinations in either "competitive" industries; or, insofar as they applied, in "regulated" industries, much less giving the Labor Board any discretion or authority in that regard.

Thus, the industry involved, retail distribution of food, is not a "regulated" industry, and the agency involved has no jurisdiction with respect to possible antitrust relaxation. Therefore the predicates for application of the primary jurisdiction doctrine, the "practical functions" it was designed to secure, are wholly lacking (Edward Douglass White, 257 U. S. xxv).

The Labor Board exists for two basic purposes: First, to define what are appropriate collective bargaining units and to conduct representation proceedings to determine whether the employees in such a unit desire a collective bargaining

agent, and, if so, what agent; second, to stop and to remedy specified unfair labor practices by employers or labor organizations.

The Labor Board has no authority to say that because a combination of businessmen and labor unions memorialize in a collectively bargained contract an agreement which is illegal under the antitrust laws, that the illegal agreement has become legal. Merely because the Board has jurisdiction to rule whether the parties have bargained in good faith, it does not follow that the Board has exclusive or even primary jurisdiction to decide whether the bargain is a lawful one. Moreover, with respect to the precise question here involved, it may be observed that the Board is wholly lacking in special competence, expertise, or jurisdiction, to explicate the antitrust laws.

There have been many problems under the Labor Act involving questions of federalism and pre-emption where the controversy involved either allegedly tortious conduct in abuse of the employer-employee relationship or the form or manner of remedy therefor. Typical cases are: *Garner* v. *Teamsters Union*, 346 U. S. 485; *United Construction Workers* v. *Laburnum Construction Corp.*, 347 U. S. 656; *Weber* v. *Anheuser-Busch*, 348 U. S. 468; *United Automobile etc. Workers* v. *Wisconsin Employment Relations Board*, 351 U. S. 266; *Guss* v. *Utah Labor Relations Board*, 353 U. S. 1; *International Association of Machinists* v. *Gonzales*, 356 U. S. 617; *Automobile Workers* v. *Russell*, 356 U. S. 634. Central to those cases, and others like them, was the basic question of resolving rights or remedies as between employer and employee or the employees' organization. Whether the judicial rubric be "pre-emption" or "federalism," the fact is that the core of the controversies concerned subject matter committed to the Labor Board.

Detailed analysis of those and similar cases is unnecessary in the case at bar because they all go to a different

problem from that presented here, but to the extent they may be deemed material it should be noted that where state law provided a remedy of exemplary or punitive damages unavailable in Labor Board proceedings, as in *Laburnum* and *Russell*, *state jurisdiction has not been held pre-empted.* Here, we submit the Labor Board has no jurisdiction whatever to pass on antitrust cases, but aside from that it is also apparent that the Congressionally created antitrust remedy of treble damages and attorneys' fees is just as unavailable in Labor Board proceedings as were punitive damages in *Laburnum* and *Russell*. By parity of reasoning the conclusion would follow that this court action is maintainable even if it be assumed that there is a Labor Board remedy for part of the controversy.

Clearly different from the pre-emption cases we have just referred to is the line of cases involving alleged or actual antitrust violations, whether by unions alone or by business-union combinations as here. Such cases, regardless of outcome, have been treated as unquestionably calling for direct disposition by the courts. There are such cases as *Apex Hosiery Co.* v. *Leader*, 310 U. S. 469, and *United States* v. *Hutcheson*, 312 U. S. 219, finding that labor union conduct did not violate the Sherman Act (which indicate the dichotomy between things managerial and things labor about which the present petition would grieve), and other cases which were foretold by the following sentence in *Hutcheson* (p. 232):

> "So long as a union acts in its self interest and does not combine with non-labor groups, the licit and the illicit under § 20 [of the Clayton Act] are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongfulness, the selfishness or unselfishness of the end of which the particular union activities are the means."

such as *Allen-Bradley Co.* v. *Local Union No. 3*, 325 U. S. 797, heretofore discussed, *Columbia River Packers Associ-*

ation, Inc. v. *Hinton*, 315 U. S. 143, *Hawaiian Tuna Packers* v. *International Longshoremen*, 72 F. Supp. 562, *Gulf Coast Shrimpers, etc.* v. *United States*, 236 F. 2d 658, and *Anderson-Friberg, Inc.* v. *Clary & Son*, 98 F. Supp. 75, in which antitrust remedies were applied. In a recent case which touches on the subject peripherally through consideration of the relation of the Ohio antitrust law and the National Labor Relations Act, *Local 24 International Brotherhood of Teamsters* v. *Oliver*, 358 U. S. 283, this Court did not so much as intimate that the courts were not the initial proper forum and, although upholding the right to bargain collectively for wage scales and to protect them against undercutting, significantly said (p. 296), "Federal law sets some outside limits (not contended to be exceeded here) on what their agreement may provide." In the case at bar the limits set by the Federal antitrust laws clearly have been exceeded.

There are two other observations which we submit are pertinent:

(1) Not only is there not a line in the Labor Act indicating that Congress ever had any intention of committing any antitrust discretion to the Labor Board, but the further fact is that the *Allen-Bradley* decision was handed down in 1945. Since that time labor legislation has been a perennial topic of Congressional debate; the Act was radically amended in 1947 and in 1959; less important amendments were made in 1950. If *Allen-Bradley* was wrong, there has been ample time since 1945 for Congress to have corrected it.

(2) The unique internal structure of the agency, with its division of responsibilities between the General Counsel and the members of the Board is quite different from that of the Interstate Commerce Commission and other agencies that have been recipients of primary jurisdiction In the other agencies the parties can be remitted to the agency and

a hearing by it, whatever the ultimate result may be, is assured. But here, Jewel could be remitted *only to the General Counsel of the Board, not to the Board itself* (Sec. 3(d), App. hereto).

The General Counsel might exercise his discretion not to issue a complaint, in which event there would be no hearing by the Board whatsoever—nor any appeal to it. But even if a complaint was issued, Jewel could not prosecute its own case; its rights would be limited by such presentation as the General Counsel saw fit to make. For the foregoing procedural reasons, peculiar to the Labor Board, it will be seen that the usual primary jurisdiction benefits of assured agency action on the parties' contentions would be absent even if it be assumed that the Labor Board had power to relax the antitrust laws. It would be grossly inconsistent with sound antitrust policy to hold that a private party, wronged by an antitrust violation and entitled to treble damages, and perhaps to injunctive relief, had to submit his case to such a devitalizing, time-consuming and fruitless procedure.

III.

We submit the foregoing demonstrates that certiorari should not be granted. However, the petition is replete with misstatements of fact contrary to, or not inferable from the complaint by which petitioners seek to color their argument. These should be corrected:

The most outstanding is the one repeated in various forms in the petition, and already noticed, to the effect that the butchers do not wish to work after 6:00 p.m. But the complaint shows that by their contracts the butchers say they are perfectly willing to work evenings whenever, in the employer's discretion, they should, so long as they are paid at overtime rates. What should be paid butchers for work after 6:00 p.m. is not in issue. The simple fact is that the

butchers are willing, in Chicago as elsewhere, to work evenings—but, *in combination with Associated, they are not willing that their employers compete with each other by dealing with the public in the evening.*

Again, the petition asserts that Jewel would satisfy the "butchers' [non-existent] wish" not to work after 6:00 p.m. by taking work away from them. However, what paragraph 11 of the complaint (R. 7) actually shows is that after the preparation of the packaged meat it is not necessary for butchers to be on duty at all hours at which meats are actually purchased under the self-service system because "the incidental tasks of arranging the cuts in the cases and cleaning the cases need not be performed continuously throughout store hours and can be performed by others *or can be performed by butchers some hours prior to the ending of store hours.*" By stating the foregoing alternatives, respondent does not seek to take work away from butchers under the self-service contract which recognizes petitioner unions as exclusive bargaining agents for a unit of "all employees in the meat department * * * who process, pack, wrap, handle and sell frozen and fresh meats" (R. 33).

Cleaning the display cases is mere housekeeping, and the contract is silent as to who should do it.

Certainly arranging ("stocking") the packaged cuts of meat within the display cases could be held to be "handling" meats, although such construction is by no means required. But whatever the construction of "handling" may be, the complaint neither admits nor asserts that respondent would take this simple task away from butchers, because the complaint alleges that if a butcher's hours of work should end at 6:00 p.m., while the market stays open until 9:00 p.m., the butcher could perform this menial service before he left. This is precisely what is now done with respect to stocking the self-service case with delicates-

sen and allied meat products that respondent is permitted to sell after 6:00 p.m. (See Art. 2, Sec. 3, Self-Service Contract, R. 33).

With respect to "selling" in self-service markets, butchers, in a legal sense, never "sell." The "sale" is not actually made until the customer has selected his cut and carried it to the store cashier, who notes the price and collects the money. Cashiers are not members of the "meat department" and therefore are not in Amalgamated's bargaining units. Petitioners have not objected to the making of sales by the cashiers. Therefore, neither from strict legal construction of the contract nor from the practical construction the parties already have placed on it, would mere extension of market hours in self-service stores in any way change the practice with respect to "selling."

Again, the petition asserts that respondent seeks to increase the "work-load" on individual butchers either through increasing the volume of business in a store or by lengthening the hours of employment, but there is not a line of the complaint that may fairly be construed to show the "work load" of any individual butcher would be increased. On the contrary, it is a matter of common knowledge that employers generally maintain a fairly constant work load per employee by expanding or contracting the size of their working forces or increasing or staggering shifts as business expands or contracts.

IV.

If certiorari were granted, it could only be upon the supposition that perhaps Congress intended, or that perhaps the sound administration of justice required, that whenever a person believes he has been injured in his business or property through an antitrust violation by a combination of businessmen and labor organizations, he must

submit his case to the Labor Board before proceeding with the Congressionally created and socially desirable treble damage action. No grounds of policy or of decisional law are shown for the possible validity of so unusual and inventive a supposition.

The Court has sufficient problems presented to it that are of a real and substantial nature without granting certiorari to explore what must in final analysis amount to a contention that labor unions and businessmen can enter into agreements to suppress competition, and that the Labor Board is the proper forum to decide initially to what degree they may do so. This is particularly true in a case where the practical result sought to be achieved is to continue in the Chicago area an abusive trade practice which has been abandoned elsewhere throughout the nation.

CONCLUSION.

For the reasons stated the instant petition for a writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX.

1. A relevant provision of the National Labor Relations Act, as amended (61 Stat. 319(d), 29 U.S.C. § 153(d)) not quoted in the petition is as follows:

> "Sec. 3(d) There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law."